IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,338

ROBERT D. HEINEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The State's answer brief completely ignores the record of the evidentiary hearing, including the trial court's factfindings. Indeed, the State's brief is not about this case or this record. While the State argues that Mr. Heiney "cannot hide from the record on appeal" (Answer at 13), that is precisely what the State has done. Thus, the State ignores the following factfindings made by the lower court:

> (1) The lower court found that "trial counsel's handling of the penalty phase of the trial was measurabl[y] below the standard established for reasonably competent counsel" (PC-R. 2335) because "trial counsel should have investigated to determine the existence of the above mentioned mitigating factors. Had counsel done so, he would have discovered them to have existed and should have presented them to the trial court during the penalty phase of trial, which counsel did not" (PC-R. 2334-35).
>
> (2) The lower court held that "the mitigating factors found to exist" (PC-R. 2335) included:
>
> > "a) The defendant was a chronic substance abuser and may have been affected by alcohol and/or other drugs at the time of the offense;
> >
> > b) The defendant suffers and has been diagnosed as having a borderline personality disorder;
> >
> > c) That defendant was chronically abused physically and emotionally as a child; and,
> >
> > d) The combination of these factors could have resulted in a person who has a very difficult time coping with any extremely stressful situation" (PC-R. 2334).

These facts establish that trial counsel's performance was deficient and that Mr. Heiney was prejudiced by counsel's errors. Mr. Heiney is entitled to relief, and the lower court's denial of relief should be reversed.

The State's arguments neglect to mention these factfindings and neglect to discuss the actual record of the evidentiary hearing. Rather, the State resorts to mispresenting the record. For example, the State argues that Mr. Heiney "could not raise" an issue alleging ineffective assistance of counsel (Answer at 2), but that "[f]or reasons unknown" this Court ordered an evidentiary hearing on this issue (Id. at 3). The State contends that Mr. Heiney "could not raise" this issue because Mr. Heiney was co-counsel at his trial and that "Mr. Heiney never brought up this issue" at the evidentiary hearing (Answer at 9).[1] The State has not examined the record. At the evidentiary hearing, Defendant's Exhibit A was a note trial counsel wrote to his investigator (PC-R. 749).[2] The note said:

> Ask [Defendant] if he wants to be co-counsel.

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[1]The State contends that Mr. Heiney "took strategic measures to keep the [co-counsel] issue away from" the lower court (Answer at 10). This is so, the State argues, because trial counsel's files were not disclosed to the State (Id.). The record reveals, however, that the State never raised any issue regarding trial counsel's file in the lower court. The file was sitting out in the courtroom, and trial counsel identified it as his file (PC-R. 4). Throughout his testimony, trial counsel identified specific documents contained in the file (PC-R. 12, 13-14, 16, 18, 23). Again, counsel for the State (who was not present at the evidentiary hearing) has failed to review to record.

[2]A copy of Exhibit A is attached to this brief as Attachment A.

> I think its [sic] advantageous because it will give him an opportunity to get to know the prospective jurors because he will do some of the questioning of the prospective jurors (and they in turn get to know him).
>
> I'll do all the work. It's only a method of getting a better relationship between him and the people (i.e. jury) that will judge him.

(PC-R. 749)(emphasis added). Trial counsel testified that he wrote this note (PC-R. 12). Trial counsel's investigator testified that he received this note and that he and trial counsel then discussed this idea with Mr. Heiney (PC-R. 37-38). Thus, to whatever extent the question of Mr. Heiney's status as co-counsel required resolution,[3] the question was resolved at the hearing. Trial counsel urged Mr. Heiney to be co-counsel only as a way for the jurors to get to know Mr. Heiney, and as the note states, trial counsel remained responsible for Mr. Heiney's defense ("I'll do all the work"). The State has neglected to examine the record.

Again ignoring the record, the State attaches some significance to the fact that Mr. Heiney received a pretrial mental health examination (Answer at 1, 12), although the State's point regarding this evaluation is not clear. The State's brief neglects to mention that the record establishes that the pretrial evaluation was directed only toward the guilt-innocence phase,

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[3]The State recognizes that it raised arguments regarding Mr. Heiney's status as co-counsel during the prior Rule 3.850 appeal in this Court (Answer at 2-3). This Court's remand for an evidentiary hearing on ineffective assistance of counsel resolved that argument.

that the evaluator was not asked to evaluate for or give opinions regarding mitigation, that the evaluator was not provided any background information regarding Mr. Heiney, and that the evaluator was not qualified to conduct a forensic evaluation or render opinions. Trial counsel testified that the pretrial evaluation went "towards evidence for the actual trial as to guilt or innocence" and was not designed for the penalty phase (PC-R. 20). Trial counsel's investigator testified that he did not speak to anyone at the Okaloosa Guidance Clinic about Mr. Heiney and did not provide the clinic with any information about Mr. Heiney (PC-R. 39). The affidavit of Linda Haese, who conducted the pretrial evaluation, was admitted in evidence (PC-R. 115; 2330-32; Def. Ex. P).[4] Ms. Haese's affidavit states that she was not asked to evaluate for mitigation and was not provided any information or background records regarding Mr. Heiney's history (Def. Ex. P.). Ms. Haese's affidavit also states that she was not a licensed psychologist, that she "had little or no guidance" regarding how to conduct forensic evaluations, and that she "didn't really know what I was doing in conducting court-ordered evaluations" (Def. Ex. P).[5] The

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[4]The State appears to argue that this affidavit should not be considered (Answer at 12-13). However, as the record reflects, the affidavit was admitted into evidence without objection from the State (PC-R. 115).

[5]The State argues that the pretrial evaluation was done "under the direction of Dr. Sasser, a licensed psychologist who signed the final report" (Answer at 1) and that Mr. Heiney "was examined by Dr. Sasser and his staff" (Id. at 12). While the relevance of these arguments is not clear, the record is clear

(continued...)

record, which again the State ignores, thus established that trial counsel failed to investigate and prepare for the penalty phase, as the lower court found.

Further ignoring the record and the lower court's factfindings, the State argues that trial counsel was not ineffective because one of Mr. Heiney's sisters was in contact with trial counsel (Answer at 3-4, 11, 17). Trial counsel was not ineffective, the State argues, because "[n]o one came to help" (Id. at 17). Of course, the State ignores the clear evidence that none of Mr. Heiney's family members was asked to help. One sister, Ms. Yanni, testified that Mr. Heiney's attorney never contacted her and that if the attorney had contacted her she would have told the attorney what she knew about Mr. Heiney's life (PC-R. 48). Ms. Yanni did not know Mr. Heiney was on trial for murder in Florida (PC-R. 49), but she was in touch with her sister Jean Vallera during that time period (PC-R. 50). Ms. Vallera testified that she received a call from Florida indicating that Mr. Heiney was facing murder charges, but she did not know who the caller was (PC-R. 54). The caller did not indicate there was any way for Ms. Vallera to assist and did

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[5](...continued)
that the pretrial evaluation was conducted by Ms. Haese, who "had little or no guidance" and who was not asked to evaluate for mitigation.

The State also argues that Mr. Heiney did not cooperate with the Okaloosa Guidance Clinic (Answer at 11, 14). Again, the relevance of this argument is not clear and the State cites nothing from the record to support this argument. The State's argument is belied by the fact that Mr. Heiney did participate in the limited evaluation conducted by Ms. Haese. Again, trial counsel failed to ask Ms. Haese to evaluate for mitigation.

not ask her anything about Mr. Heiney (PC-R. 56). The affidavit of another sister, Jacqueline Ward, was admitted as evidence (PC-R. 59, 771-72; Def. Ex. J).[6] Ms. Ward's affidavit states that trial counsel never contacted her, although she would gladly have spoken to trial counsel and would have done whatever she could to help (PC-R. 771-72). Mr. Heiney's niece, Lou Ann Ward, testified that if she had been contacted at the time of Mr. Heiney's trial, she would have spoken to trial counsel (PC-R. 62). She did not know about Mr. Heiney's trial until after he was convicted, but lived in the same area as Jean Vallera (Id.). Trial counsel's investigator testified that he did not interview any family members regarding Mr. Heiney's background (PC-R. 38). Trial counsel testified that he did not question any family members regarding Mr. Heiney's history (PC-R. 11).

As the lower court found, trial counsel's performance was deficient because he did not investigate for the penalty phase. A phone message in trial counsel's file indicated that counsel received at least one call from the family (PC-R. 63), and the lower court accepted as a matter of fact that Ms. Vallera had contact with trial counsel (Id.). Thus, counsel had the means of investigating Mr. Heiney's history -- he could have reached family members through Jean Vallera -- but he failed to ask any

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[6]The State appears to contest consideration of Ms. Ward's affidavit (Answer at 4). Ms. Ward was subpoenaed to appear at the hearing but the Court of Common Pleas, Columbiana County, Ohio, exempted her from appearing for medical reasons (PC-R. 58, 770; Def. Ex. I). The lower court admitted Ms. Ward's affidavit as evidence (PC-R. 59).

family members what they knew and did not request their assistance. As the lower court concluded, this was deficient performance.

Continuing to ignore the record, the State argues that "[s]trategic decisions, including the decision not to put on conflicting guilt and penalty phase defenses, are not subject to review" (Answer at 12). The State does not cite to any portion of the record indicating that trial counsel made a strategic decision regarding the penalty phase. Nor could the State do so: the lower court found as a matter of fact that trial counsel did not investigate for the penalty phase (PC-R. 2334-35). The lower court's finding that trial counsel did not investigate is amply supported by the record (See Initial Brief, pp. 7-15, discussing testimony of trial counsel and counsel's investigator). The finding that trial counsel did not investigate for the penalty phase is an implicit finding that trial counsel had no strategic reason for his omissions. Without investigating, trial counsel has no basis for making a strategic decision: "A strategic decision ... implies a knowledgeable choice." Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989), quoting, Eutzy v. State, 536 So. 2d 1014, 1017 (Fla. 1988)(Barkett, J., dissenting); Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989)(decisions regarding evidence to be presented at a penalty phase "must flow from an informed judgment," based upon investigation). Further, the State's argument ignores the record evidence establishing that trial counsel would have presented the mitigating evidence

presented at the evidentiary hearing (PC-R. 7-10, 13, 34, 15-16).[7] If counsel would have presented this evidence, he clearly had no strategic reason for not presenting it. Thus, the State's reference to strategy is contrary to the record and the lower court's findings.

Along the same lines, the State argues that no evidence was presented showing that the mitigation presented at the hearing would have been presented at the penalty phase (Answer at 4, 6). The State contends that trial counsel would not have presented the evidence because, according to the State, the mitigation was inconsistent with Mr. Heiney's guilt phase defense (Answer at 2, 12).[8] The State cites no testimony to support this argument for the simple reason that there is none.

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[7]Trial counsel's testimony on this matter is quoted in Mr. Heiney's initial brief (pp. 9-12).

[8]In addition to being contrary to the record, the State's argument is contrary to logic and to the law. None of the mitigating evidence is inconsistent with Mr. Heiney's not guilty plea. The evidence concerned Mr. Heiney's history and his longstanding emotional and mental deficits. Based upon Mr. Heiney's history and mental health deficits, the mental health experts offered opinions regarding Mr. Heiney's mental state at the time of the offense. The presentation of this evidence would not have (and, at the evidentiary hearing, did not) required Mr. Heiney to admit guilt. Further, at the time of the penalty phase, the jury had found Mr. Heiney guilty. To fulfill his duties to Mr. Heiney, defense counsel was required to accept this verdict and present a sentencing defense. Finally, under the law, Mr. Heiney's not guilty plea could not be used against him and did not foreclose his right to present a penalty phase defense. See Holton v. State, 573 So. 2d 284, 292 (Fla. 1990)("A trial court violates due process by using a protestation of innocence against a defendant. This applies to the penalty phase as well as to the guilt phase. . . . Therefore, entering a plea of not guilty does not preclude consideration by the sentencer of matters relevant to mitigation.").

In fact, trial counsel testified that he would have presented this evidence at the penalty phase (PC-R. 7-10, 13, 34, 15-16). Despite conducting no investigation regarding Mr. Heiney's background, defense counsel did recognize that Mr. Heiney had mental health problems which deserved investigation. Counsel testified that at the time of Mr. Heiney's trial, "I was of the opinion that Mr. Heiney did have drug problems, very serious drug problems" and that he knew that right before the offense Mr. Heiney was drinking alcohol (PC-R. 26). Counsel also testified that one of his conversations with Mr. Heiney "certainly made me suspect something" about Mr. Heiney's mental state (PC-R. 28). At the time of trial, counsel believed Mr. Heiney "had psychological problems" and "obviously he's got some neurosis" (PC-R. 29). Counsel did file a motion for a mental health expert regarding guilt/innocence phase issues (PC-R. 18-19). Counsel also acknowledged that his file contained his handwritten note regarding the need for a motion for a psychiatric examination to be used in the penalty phase (PC-R. 23). The note stated, "mot for psych exam to be used in sentencing hearing or ample time bet trial and sentencing hearing -- shrink of D's choice" (Defense Ex. F; PC-R. 764). Counsel testified that the note indicated he wanted to present mental health evidence at the penalty phase: "This statement -- Motion for Psych Exam to be used for sentencing hearing, I would say obviously, yeah, planning on using it at the sentencing hearing" (PC-R. 23). No such motion was ever filed. Counsel had no

recollection of ever discussing mitigation with any mental health expert or what a mental health expert could have said in the penalty phase (PC-R. 21). However, counsel acknowledged that he argued to the jury during the penalty phase that Mr. Heiney was under the influence of extreme mental or emotional distress and that his capacity to conform to the law was substantially impaired at the time of the offense (R. 1328; PC-R. 21-22).

The lower court found that had trial counsel investigated for the penalty phase, "he would have discovered [the mitigating factors found by the court] to have existed and should have presented them" (PC-R. 2334-35). The trial court's finding is amply supported by the record. Again, the State's argument ignores the record.

Regarding prejudice, the State does not mention that the lower court found as a matter of fact that the evidence established four nonstatutory mitigating factors.[9] Thus, while the State attempts to attack the basis of the mental health experts' conclusions (Answer at 4-6, 14-15), the State does not address the lower court's finding that mental health and other mitigation had been established. The State does not address the numerous documentary exhibits introduced which chronicle Mr. Heiney's history. The State does not address the family members' testimony regarding Mr. Heiney's history. All of this evidence

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[9]As discussed in Mr. Heiney's initial brief, the evidence also established that Mr. Heiney has organic brain damage and that two statutory mitigating factors applied (Initial Brief, pp. 37-49).

amply supports the lower court's factfinding that four nonstatutory mitigating factors had been established. The State does not address those factfindings, nor the evidence supporting them.

As to mental health mitigation, the trial court found that Mr. Heiney "suffers and has been diagnosed as having a borderline personality disorder" and that Mr. Heiney is "a person who has a very difficult time coping with any extremely stressful situation" (PC-R. 2334). The State does not mention these factfindings, but argues that the mental health experts' conclusions would not have been available at the time of the penalty phase (Answer at 14). However, the trial court found that if trial counsel had investigated for the penalty phase, counsel "would have discovered [the mitigating factors found by the court] to have existed" (PC-R. 2334-35). Of course, the State does not mention this factfinding either.[10] As the trial court found, the mental health evidence was available in 1979.

As to other mitigation, the trial court found that Mr.

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[10]The trial court's factfindings resolve the State's attacks upon the basis of the mental health experts' conclusions. The State argues, for example, that the mental health evidence would not have been available in 1979 because the experts reviewed documents which did not exist in 1979 (Answer at 5, 14). The trial court, however, correctly concluded that the mental health evidence was available in 1979 (PC-R. 2334-35). This conclusion is amply supported by the record: the experts reviewed substantial documentation, the vast bulk of which existed in 1979 and some of which concerned Mr. Heiney's trial and his incarceration since trial (See, e.g, PC-R. 68-69). On the basis of all documentation reviewed, the experts formed opinions regarding Mr. Heiney's mental state at the time of the offense, and the trial court accepted those opinions.

Heiney "was a chronic substance abuser and may have been affected by alcohol and/or other drugs at the time of the offense"[11] and that Mr. Heiney "was chronically abused physically and emotionally as a child" (PC-R. 2334). Again, the State does not mention these findings but argues, for example, "Dr. Toomer presumed that Heiney was terribly abused as a child, but confessed he had no reports of child abuse. (A point conceded by CCR as well). (TR 116-118). Dr. Toomer had no corroboration for the 'cement block' story related by Mrs. Yanni. (TR 119)" (Response at 5). However, the trial court found that Mr. Heiney "was chronically abused physically and emotionally as a child" (PC-R. 2334).[12]

In addition to ignoring the record and the trial court's factfindings, the State ignores the law regarding ineffective assistance of counsel claims. The lower court found that trial counsel's performance was deficient because trial counsel did not

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[11]The State's brief does not mention the trial court's finding regarding Mr. Heiney's substance abuse or attempt to attack the evidence regarding Mr. Heiney's substance abuse. The State apparently concedes that this mitigating factor was established.

[12]This finding is amply supported by the record. As Mr. Heiney's initial brief explains in detail (pp. 15-18, 30-34), records from Mr. Heiney's youth and the accounts of family members describe an abusive childhood. Mrs. Yanni testified regarding the "cement block" incident, and the trial court accepted that testimony. Mr. Heiney's counsel did not "concede" that there were no reports of child abuse. In fact, counsel stated, "those records corroborate the reports by his sisters that he was [physically abused by his father]" (PC-R. 118). Based upon the combination of the records and the family members' testimony, the trial court found that Mr. Heiney had been abused as a child.

investigate for the penalty phase (PC-R. 2334-35). The State's brief does not discuss the law establishing that a failure to investigate constitutes deficient performance. See Phillips v. State, No. 75,598, slip op. at 9 (Fla. Sept. 24, 1992)("Counsel testified at the postconviction hearing that he did virtually no preparation for the penalty phase. The only testimony presented in mitigation was that of [one witness]. The State has conceded that counsel's performance was deficient at the penalty phase. . . ."); Stevens v. State, 522 So. 2d 1082, 1087 (Fla. 1989); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988).

The lower court also found that the evidence presented at the hearing established four nonstatutory mitigating factors (PC-R. 2334). Accepting the lower court's factual determinations regarding deficient performance and mitigating factors, the question is whether the lower court's legal conclusion that Mr. Heiney was not prejudiced is correct: "The existence of material nonstatutory mitigating evidence that was not discovered by trial counsel is undisputed. The question is whether [the mitigating evidence] raises a reasonable probability that, absent the deficient performance, the outcome of the penalty proceeding would have been different." Bassett, 541 So. 2d at 597. In Mr. Heiney's case, the law (which is not discussed by the State) establishes that the lower court's legal conclusion was erroneous and that Mr. Heiney was prejudiced by trial counsel's deficient

performance.

The lower court determined that prejudice had not been established "[b]ecause the non-statutory mitigating factors found to exist in this case when weighed against the existing aggravating factors would not have reasonably persuaded the trial court against a jury override" (PC-R. 2335). The lower court applied an erroneous legal standard to the prejudice question. In an override case, prejudice is established (i.e., confidence in the outcome is undermined) if the mitigation omitted as a result of counsel's deficient performance would have provided a reasonable basis for the jury's life recommendation: "if the trial judge views the case as one without any mitigating circumstances when in fact those circumstances exist, then confidence in the trial judge's decision to reject the jury's recommendation is undermined. . . . At that point it cannot be said that no reasonable person could differ as to the appropriate penalty." Stevens, 552 So. 2d at 1087. In Mr. Heiney's case, no mitigation was presented at the penalty phase and the trial judge found that no mitigation existed, but the Rule 3.850 court determined as a matter of fact that mitigation did exist. As Mr. Heiney's initial brief explains (pp. 51-53), the mitigating factors which did exist are valid, recognized mitigation which would have provided a reasonable basis for the jury's life recommendation. Therefore, "confidence in the trial judge's decision to reject the jury's recommendation is undermined." Prejudice is established because presentation of the mitigation

would have resulted "in a recommendation of life reasonably supported by mitigating evidence." Phillips, slip op. at 11. Mr. Heiney is entitled to relief.

Mr. Heiney's initial brief recognized that under Stevens the appropriate remedy is a judge resentencing at which Mr. Heiney would receive the benefit of the jury's life recommendation. 552 So. 2d at 1088. However, the initial brief suggested that under the unique circumstances of this case, a more appropriate remedy would be a remand with instructions to impose a life sentence (Initial Brief, pp. 57-58). This Court clearly has the authority to order the imposition of a life sentence, Scott v. Dugger, 17 F.L.W. S 545 (Fla. July 23, 1992), and in this case, such an order is in the interests of judicial economy.

CONCLUSION

Based upon the foregoing and Mr. Heiney's initial brief, Mr. Heiney respectfully urges the Court to reverse the decision of the lower court and grant all other relief which the Court deems just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 5, 1992.

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ATTACHMENT A